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IN THE

Supreme Court of the United States

October Term 1969

No. 417

ERNEST LEE GORDON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION

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and

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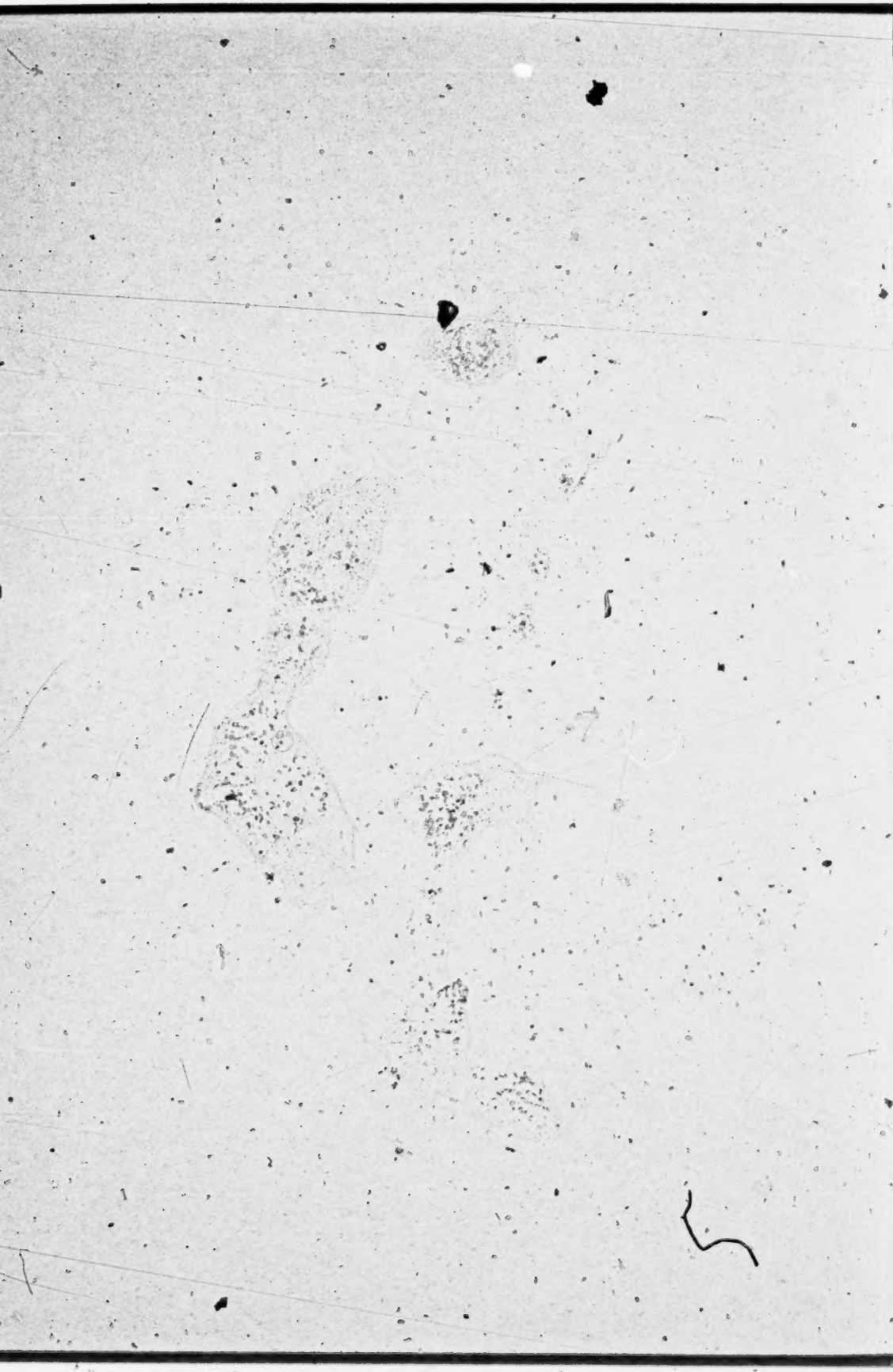

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STATEMENT OF THE CASE

The petitioner, Ernest Lee Gordon, (hereinafter, the "defendant"), was directly indicted by the Grand Jury of Franklin County, Ohio, on May 18, 1964, for one count of violating Section 3179.16, Revised Code of Ohio, the exempt narcotics statute, in that he "did obtain under the exemptions of Section 3719.15 of the Revised Code, more than one preparation exempted by the provisions of that section within 48 consecutive hours." The indictment was filed on May 21, 1964, and the next day bond was set at $4,000.00 by the Court of Common Pleas and a capias issued to the Sheriff of Franklin County, Ohio, to bring in the defendant. The defendant was never found in the jurisdiction and on June 23, 1966, a capias was issued to the Chief of Police, New York City, New York, to arrest and detain the defendant who was apparently residing at 240 West 103rd Street in that city.

On January 25, 1967, return was made on the arrest order issued to New York City. The indictment was finally served on the defendant at the county jail and on January 27, 1967, he was arraigned on the charge, at which time he was represented by Attorney Abraham Gertner, and entered a plea of not guilty. The bond previously set had

been subsequently reduced to $1,000.00 by entry of the court and on January 30, 1967, the defendant was released on bond posted by the Maryland Surety Company.

A bill of particulars was provided defendant at request before trial. The first trial assignment was continued by agreement of the parties and the case was finally set down and tried on September 7, 1967, at which time the jury returned a verdict of guilty to the charge. A motion for a new trial was filed on September 11, 1967, and was overruled by decision of the court rendered on September 19, 1967, and subsequently journalized on September 27, 1967. On October 25, 1967, the defendant was sentenced to the Ohio Penitentiary and to pay costs; a $1,000.00 fine was suspended, and the defendant filed his notice of appeal from the judgment and sentence and remained free on appeal bond.

Five specific assignments of error were alleged by defendant in the Court of Appeals. The case was argued on April 16, 1968, and a decision was eventually rendered on September 10, 1968, affirming the judgment of the Court of Common Pleas and dismissing the appeal. An application for reconsideration was then filed by the defendant and by a decision of October 10, 1968, an opportunity was then afforded him by the Court of Appeals under the provisions of Article IV, Section 3 (B) (f) of the Ohio Constitution to produce additional evidence on the "hearsay" question (not presented in this petition).

The defendant thereafter filed a memorandum stating that such evidence was not available but further urged additional reconsideration by the court of the "constitutional problem" involved in the comment by the prosecuting attorney to the jury, which is the question now presented to this Court.

A third and final decision then was rendered by the court

on October 29, 1968, stating that the application for reconsideration must be denied. Defendant then moved successfully to stay execution and to remain on bond and after the judgment entry was journalized, filed a motion for the Court of Appeals to certify the judgment to the Ohio Supreme Court as being in conflict with the decision of another Ohio Court of Appeals in *State* v. *Murphy*, 13 Ohio App. 2d 159 (1967), on the question of prosecutor comment.

The application to certify was denied by the Court of appeals by entry of December 5, 1968, and thereafter defendant filed notice of appeal to the Ohio Supreme Court, both as of right and on motion for leave to appeal. The only question presented in the briefs and in argument was the matter of the comments of the prosecuting attorney during closing arguments and on May 21, 1969, the Ohio Supreme Court overruled the motion for leave to appeal and dismissed the appeal as of right.

A petition for a writ of certiorari was sought from this Court on this same question.

At the trial, the state's evidence consisted of the testimony of two pharmacists, Mr. Wayne C. Miller of Seelig's Pharmacy, and Mr. Stephen Joseph, Jr., who at the time of these events was employed at Tyler's Drugstore No. 1 at 1081 Mt. Vernon Avenue. Mr. Miller testified that on January 4, 1964, he sold a preparation of Cosanyl to a person who signed his name "E. Gordon" and his address "940 East 11th Avenue" on the exempt narcotics register and that he, Mr. Miller, initialed the register to indicate he made the sale. He further testified that the preparation was in the amount of four ounces and that it contained four grains of codeine. Mr. Joseph, the second pharmacist, testified to essentally the same matters, that on January 4, 1964, he sold four ounces of cosanyl to a person who signed "E. Gordon" and an address of "940 E. 11th Avenue," that he

also initialed the register and that four ounces of Cosanyl contains four grains of codeine.

The state also offered the testimony of Detective Stanley Grodell that he obtained the page from the exempt narcotics register from each of the drugstores in question on April 7, 1964, and that he had them in his possession or under his control since that time until presented at trial. He further testified that the Exempt Narcotics Register is a bound volume and that he obtained the pages in question by tearing them out of the book. Detective Grodell also testified that he had talked to the defendant about this matter and that Gordon did admit making purchases of Cosanyl but that he couldn't say when he made the particular purchases.

The state's final witness was Detective Fraley who qualified as a handwriting expert and who examined the signatures "E. Gordon" on the pages of the Exempt Narcotics Registers in question and compared them with a signature of the defendant obtained by Detective Fraley personally from the defendant at an earlier date. Detective Fraley testified that in his opinion these were all made by the same man and that the defendant did sign the pages of the Exempted Narcotics Register.

The defendant himself did not testify and the defense presented only the testimony of Theodore Schlonsky, a pharmacist for thirty years, who testified that there was both a narcotic and a non-narcotic form of Cosanyl manufactured by the Parke-Davis Company and produced a page from the Parke-Davis catalogue for December, 1965, to show that they were both offered for sale at that time. He further testified that "they are both put out the same way" (Tr. 80) and "they both look identical" (Tr. 80) and just to be on the safe side "without even thinking I record them both." (Tr. 88.) He did admit that the non-

narcotic preparation was clearly marked as such on the label and that the narcotic form was also identified by an "X" on the label to indicate its contents.

In rebuttal, the state produced Mr. Phillip R. Marsh, the field manager for Parke-Davis, who had been employed by them for twenty-five years. He testified that the non-narcotic form of Cosanyl was first manufactured for sale by Parke-Davis on October 11, 1965. He obtained this information by calling the branch office in Cincinnati that morning and talking to the officer manager. This testimony was objected to by defense counsel but was admitted by the court stating that the objection goes only to the weight of the evidence (Tr. 96).

This was all the evidence presented and the jury deliberated only briefly before finding the defendant guilty as charged.

QUESTIONS OF LAW PRESENTED

(1) Were the comments of the prosecuting attorney in this case in his closing argument to the jury merely comments upon the evidence produced or did they improperly call attention to the failure of the defendant to take the stand and as such violate his Fifth Amendment rights against self-incrimination as established in *Griffin* v. *California,* 380 U. S. 609 (1965)? (2) If the comments could be construed as a failure of the defendant to testify and were in violation of his rights under the Fifth Amendment did the defendant waive this error by his failure to object or in any way call the error to the court's attention at the trial stage so that remedial action could be taken before the jury's verdict was returned?

LAW AND ARGUMENT

I

The Comments of the Prosecutor

The defendant predicates his whole petition to this Court

upon comments made by the prosecutor during closing argument which he contends drew attention to the defendant's failure to testify and were in violation of defendant's Fifth Amendment rights as established in *Griffin* v. *California,* 380 U. S. 609 (1965). We might note that the first mention of these alleged violations occurred in the motion for new trial after the verdict of the jury had been returned and that no objections to the statements were made at trial at any time during the arguments or charge, so that if the prosecutor's comments drew the attention of the jury to the fact that the defendant did not testify they failed in any way to come to the notice of defense counsel who was present while all of this transpired and sat quiet, *although he in fact objected to the statement immediately preceding the offending comment.* (Tr. 100).

There is no objection in any way to the general proposition of law stated by the appellant as to the fact that no comment can be made upon the failure of the defendant to testify. It is felt, however, that nothing which was said or even intimated by the prosecutor in this case comes anywhere near such a comment nor could it be construed to be intended to be such comment as would justify the error and the prejudice now claimed by defendant.

The defendant bases his contentions upon two particular comments. The first of these occurred (at Tr. 100) in the first part of the prosecutor's summation to the jury. After outlining the function of closing argument and the significance of the indictment, the prosecutor reviewed the evidence in the case, witness by witness, and closed by saying:

> "I would also like to call your attention that not one bit of this evidence has been contradicted in any way, and I believe if you base your decision upon the evidence presented that there is only one verdict you can return . . ." (Tr. 100).

Defense counsel then started with his argument and ap-

parently was not then of the opinion that this had been a comment on the defendant not testifying, since, not only did he not object or comment, but he proceeded to dispute the fact that the evidence was not contradicted.

> "Let's recall, what was this evidence which the Prosecuting Attorney says has not been contradicted. What was this evidence?" (Tr. 101).

Counsel then proceeded to analyze all the evidence in the case and the particular merits of each kind of evidence. He specifically went into the question of handwriting and commented upon the weakness of the state's testimony and Detective Fraley's preparation for trial. (See for example Tr. 104, 105, 106).

> "Now, what about the expert, Sgt. Fraley? He didn't say it was written by the same man. He said the signatures appeared to be the same . . ." (Tr. 104) . . . "I was amazed at Sgt. Fraley's form of testimony." (Tr. 104).
>
> * * *
>
> ". . . but to pin an entire identification on a handwriting expert alone, this is the most horrible thing in the world." (Tr. 105).
>
> * * *
>
> "This is the weakest most flimsy form of evidence. Now what actually happened in this case? What took place?" *Somebody put E. Gordon's name down. Somebody knew where he lived.*" (Emphasis added.) (Tr. 106).

The second comment which appellant now objects to and finds reprehensible was in fact a direct reply to the above statements. Beginning at page 109 of the trial record the prosecutor replied to Mr. Gertner's assertions about the evidence:

> "Like I said, no matter what I say or Mr. Gertner says what you should believe, unless there is some evidence in the record to substantiate it you are entitled to consider it and . . ."

Then begins the alleged offending comment:

> ". . . not one person has taken the stand to say that

anyone knew where this defendant lived and not one person has taken the stand to say that it is not his signature on State's Exhibit 1 and 2." (Tr. 109).

The further comments of the prosecutor in reply, were not only entirely proper in their own right as comments solely on the weight of the evidence in the case, but were also necessitated as response to the defense counsel's assertions in his own argument.

In the case of *United States* v. *Johnson*, 337 F. 2d 180, 4th Cir., (1964), aff'd in 383 U. S. 169 (1965), the prosecutor argued that the defendant had presented no defense in the case and that he had produced no evidence to deny or contradict the charges against him. The 4th Circuit Court of Appeals characterized these statements as a "review of the testimony" and not "a forbidden comment on the failure of the defendants to testify," the prosecutor, there, as here, addressed himself to the absence of anything in the record to contradict the state's version of the case and under the circumstances such comment was not considered improper.

This distinction was clearly maintained in the case of *United States* v. *Wright*, 309 F. 2d 735, 7th Cir., (1962), cert. den'd 372 U. S. 929. The Court of Appeals there cited approvingly those cases which said that the prosecutor may properly call attention to the fact that the testimony of the government witnesses had not been contradicted. It further said that the Fifth Amendment's exclusion of comment about a defendant's failure to take the stand "must be interpreted in the light of reason and it must appear that 'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' *Knowles* v. *United States*, 224 F. 2d 168, 170 (10th Cir. 1955)." at p. 738.

The Seventh Circuit did make an exception for those cases where the accused himself is the only one who could possibly contradict the testimony, and the defendant, herein, has contended for such interpretation of the comments in this case. The defendant, however, is certainly not the only one who can testify to his handwriting, and defense counsel himself even made this argument in his closing statement to the jury when he discussed and explained the manner and means of proof of handwriting in will contest cases, including the calling of witnesses to the signature, in what was an obvious effort to undermine the testimony of the state's handwriting expert. (Tr. 104, 105).

More recently the Missouri Supreme Court has also held that reference by the prosecutor to "undisputed evidence" was not a comment on the defendant's silence. The court pointed out that many similar remarks have withstood judicial scrutiny and cited a number of Missouri cases where comments such as "we have testimony undenied and undisputed . . ."; ". . . they have offered no defense to you," and "the only evidence in the case is the evidence that the state produced," have been approved. See *State* v. *Baker,* Missouri Supreme Court, 4 *Crim. Law Reporter* 2520, decided March 10, 1969.

The defendant argues in his petition that comment on the absence of evidence of any kind should be proscribed since it provides the opportunity for "wary" prosecutors to deliberately evade the *Griffin* rule. This seems a poor predicate for a constitutional rule. Certainly deliberate evasions of constitutional obligations cannot be condoned, but any standard presented is susceptible to circumvention and the question of the "intent" of the prosecutor or the "effect" on the jury is one which can best be decided by the trial court under the standards presently existing.

II

The Waiver of the Error by Failure to Object

As we have previously noted, the defendant did not find the allegedly tainted comments so clearly prejudicial to make objections to them at trial and to attempt to obviate the harm, if there were any, by having the court instruct the jury to disregard them. Nor did he pursue the path taken by defense counsel in *State* v. *Murphy*, 13 Ohio App. 2d 159 (1967), which he has used to substantiate his position in this petition, which was to approach the bench and move for a mistrial out of the hearing of the jury. The challenge to the prosecutor's statements did not take form at all until after the jury had returned its verdict and the reaction was just too late. Whatever prejudicial effect may have existed or been caused by the comment has been waived.

The defendant has anticipated this argument by the state and has asserted various reasons why waiver would not be applicable in this case. None of these is justifiable.

The courts below did not require an objection to be made *because they never got to the issue.* No one found that the questioned comments were even objectionable in the first instance so the issue of waiver was irrelevant. No pronouncement of any kind was ever made about "waiver" and the defendant's assertion in his brief that the Court of Appeals "ignored the State's waiver argument" is pure speculation.

The assertion that Ohio does not have a rule requiring objection to a comment is inaccurate. The cases cited in support of the proposition are inapposite. *State* v. *Davis*, 10 Ohio St. 2d 136, involves a situation where the defendant did testify at trial, but was reversed because the prosecutor commented in closing argument that the defendant failed to testify at preliminary hearing. The argument was objected to at the time and a curative instruction

was given by the court, but the Ohio Supreme Court said this charge could not correct the error.

In *State* v. *Minamyer*, 12 Ohio St. 2d 67 (1967), the prosecutor took the stand and testified to the fact that the defendant refused to testify at the grand jury. Upon objection, the court instructed the jury to ignore the testimony, but again the Ohio Supreme Court found that the charge did not cure the error.

The rule in Ohio was properly stated in *State* v. *Glaros*, 170 Ohio St. 471, and recently approved in *State* v. *Childs*, 14 Ohio St. 2d 56 (1968), cert. den'd April 28, 1969, 89 Sup. Ct. 1596:

> "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.
>
> "A practice should not be permitted where counsel could place his client in a position where he could take advantage of a favorable verdict and at the same time avoid an unfavorable verdict merely because of an error that counsel made no effort to prevent."

The state does have a legitimate interest in the orderly conduct of trials by the prevention of costly delays and by discouraging defendants from making erroneous records and allowing them an option after the verdict. This state interest in the timely objection requirement has been recognized by this Court in other cases. *Douglas* v. *Alabama*, 380 U.S. 415, *Henry v. Mississippi*, 379 U.S. 443. And constitutional rights may be lost as finally as others. "Counsel may, under some conditions where the circumstances are not exceptional, preclude the accused from asserting constitutional claims." *Henry* v. *Mississippi*, *supra*, at p. 451.

This was also clearly shown in the case of *Douglas* v. *Alabama*, 380 U.S. 415 (1965): "In determining the sufficiency of objections we have applied the general principle

that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take the appropriate corrective action is sufficient to serve legitimate state interests and therefore sufficient to preserve the claim for review here. *David* v. *Wechster*, 263 U. S. 22, 24; *Love* v. *Griffith*, 266 U. S. 32, 33-34;'' at p. 423. In *Douglas* this Court recognized the need for state procedural standards, but ruled that the objections which were made were sufficient to comply with those state rules and to present the issue on review, even though such objections were not strictly in compliance with that state's procedures. Here, there is no compliance whatsoever with procedural prerequisites and the conclusion is inescapable that any further objections are waived and that there is no basis to predicate review.

Recently the United States Court of Appeals for the 5th Circuit in *Samuels* v. *U. S.*, 398 F. 2d 964, on August 5, 1968, examined in detail the question of the lack a timely objection to a prosecutor's comment and concluded that the trial inaction precluded an attack on appeal.

The Court specifically held that *O'Conner* v. *Ohio*, 385 U. S. 92, not only does not obviate the need for a timely objection to the prosecutor's comment but actually reaffirms such need and constitutes only a specific exception to it. Since the *O'Conner* trial occurred before *Griffin*, this Court held that the defendant could not be required to have anticipated the application of the Fifth Amendment to the states so as to be required to object. In *Samuels*, *supra*, the Fifth Circuit noted that this Court had ''carefully refrained from any all inclusive language which would obviate the necessity to object in all cases.''

The Court of Appeals went on to find that where no objection was made until after argument was concluded, the objection was not timely. The appellant (defendant)

could obtain relief in this federal case "only if the remark was so flagrant as to constitute plain error within the meaning of Rule 52(b), F. R. Cr. P."

In deciding what was flagrant the Court said: "In determining whether the prosecutor's remark constitutes plain error, we must first consider whether the statement here in question was in fact a comment on the accused's failure to testify. In doing so we look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact on the jury. *Davis* v. *United States*, 357 F. 2d 438 (5th Cir. 1966)."

In view of the nature of both closing arguments in this case and the actual remarks of the prosecutor it is clear that the comments now objected to were not "flagrant" and were not such as would constitute "plain error" in Federal Court. The Fifth Amendment right asserted provides only that there will be no comment on the failure to testify, and not only failure to produce evidence. These could in a given case coincide, but here the question of evidence was argued and the prosecutor was well within bounds in evaluating and weighing all evidence in the case, especially the absence of contradictory evidence by the defendant.

The defendant does assert that by objecting to the statement he would serve only to reenforce the effect of the prosecutor's comment and make the damage sustained irreparable. He justifies his silence on this basis and tacitly, at least, suggests that his actions were purposeful and knowing. We have previously pointed out that he did object to the statement immediately preceding the now-questioned comment, and that he could also have quietly approached the bench, even after arguments were concluded, and requested the court for a mistrial on the basis of what had transpired.

Such error as existed, if such did exist at all, could at least have been argued and perhaps corrected during the trial stage of the case. Defendant chose, apparently knowingly, to take his chances with the jury instead and he must now be bound by his decision.

CONCLUSION

For the foregoing reasons the State of Ohio respectfully urges that the writ requested in defendant's petition be denied.

.....

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AFFIDAVIT

STATE OF OHIO
FRANKLIN COUNTY, ss:

David H. Bodiker, being duly sworn, deposes and says that he is an Assistant Prosecuting Attorney for Franklin County, Ohio, and that a copy of the foregoing Brief In Opposition has been mailed to the Attorneys for Petitioner, Abraham Gertner and Walker J. Blakey, 37 West Broad Street, Columbus, Ohio 43215, this ..... day of September, 1969.

.....

DAVID H. BODIKER

Sworn to before me and subscribed in my presence this ..... day of September, 1969.

.....

Notary Public